Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

(2)

No. 91-1570

In The

Supreme Court of the United States

October Term, 1991

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

vs.

JOHN TEAHAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

With but two exceptions, Metro-North's factual statement is correct. Those two inaccuracies — each of which is important, if not critical — are these:[1]

1. The same implicit inaccuracies are found in the first paragraph of Metro-North's "Questions Presented" (Pet'n, p. i).

1. The petition nowhere makes it clear that Teahan began the hospitalization and after-care treatment that ultimately caused his rehabilitation *before* learning that Metro-North was initiating the disciplinary proceeding which ultimately led — *after his rehabilitation* — to his dismissal for his *pre-rehabilitation* absences from work. During the ten-week period after his return to work from the rehabilitation program and before his dismissal, he was never absent from work and reported regularly to Metro-North's Employee Assistance Program. *See* Pet'n at C-3.

2. The petition nowhere makes it clear that Teahan, did not merely *claim* to have been rehabilitated before being dismissed for his pre-rehabilitation absences, but that Metro-North, in connection with its motion for summary judgment, had *conceded* that — at the time of the dismissal — Teahen had *in fact* been rehabilitated.[2]

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2. *See* page 4, n.** of Metro-North's Memorandum of Law in Support of Its Motion for Summary Judgment, a copy of which, if requested, will be supplied to this Court. In light of that concession, we submit that it is at the very least disingenuous for Metro-North to seek to persuade this Court (Pet'n, p. 6) that this petition involves a Second Circuit decision which "imposes an oppressive . . . burden upon an employer; it cannot terminate the employment of a 'current' alcoholic if the employee *claims* to be rehabilitated or rehabilitating before the end of the disciplinary process . . . ." (Emphasis added.) The obligation of candor to a court should have persuaded Metro-North to disclose its concession that it had sacked an *actually-rehabilitated* alcoholic.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE SECOND CIRCUIT'S OPINION IS NOT LIKELY TO AFFECT OTHER LITIGANTS.

Metro-North claims (Pet'n, p. 13) that the Second Circuit's opinion is the very first to rule upon the questions presented here for this Court's review. It follows, therefore, that: (a) no conflict among the Circuits exists on the questions presented; and (b) the Second Circuit's ruling — assertedly unique and uncontested during the almost twenty-year-life of the statute — is hardly likely to cause havoc among the employers governed by that statute. In short, the petition is: (a) premature; and (b) in any event, not worth the time of this Court. If correct, the Second Circuit's ruling should surely not be disturbed; if incorrect — and we show below that it is surely *not* — it needs no review.

II.

THE PETITION IMPLICITLY ASKS THIS COURT TO REPEAL THE STATUTE, RATHER THAN INTERPRET IT.

Metro-North's entire argument is based upon the proposition that the statute mandates that a determination as to the legality of discipline upon an employee for conduct caused by substance abuse be determined as of the date of the conduct rather than the date of the dismissal resulting from that conduct.

The import of Metro-North's argument is that an employer may fire an employee for misconduct caused by substance abuse

long after that misconduct occurred even if the employee has successfully rehabilitated himself, is no longer a substance abuser and, indeed, has become a model employee. This is so, Metro-North asserts, because Congress intended, "current abuse" to mean abuse of substances at ths time of the misconduct, not the time of the discipline for that misconduct. If Metro-North is correct, then a statute which courts have been interpreting for almost twenty years is a nullity evidencing an horrendous waste of congressional and judicial time. The eqivalent of a statute of limitations would never run on misconduct based upon substance abuse, no substance abuser would ever be motivated to rehabilitate himself, and the gates of mercy would remain closed or would open solely upon the unfettered whim of the employer.

A corollary of Metro-North's argument is that the employee's status as being "otherwise qualified" — a status generally preventing termination — is to be decided as of the date of the misconduct. At that date, however — *e.g.*, while excessively missing work because of substance abuse — the employee is obviously not qualified for the job. The statute therefore means nothing if Metro-North's interpretation of it is correct.

III.

THE CASES UPON WHICH THE PETITION RELIES NEVER SUPPORT AND OFTEN REFUTE THE PROPOSITIONS FOR WHICH THEY WERE CITED.

Metro-North has inappropriately cited a number of cases to support its proposition that the Second Circuit's ruling is "inconsistent with the understanding evinced by other courts' decisions . . . . " (Pet'n, p. 13). None of its cited cases truly supports its position; many support ours. We deem it unnecessary

to analyze each case it cites, but note some examples in the margin.[4]

CONCLUSION

As we have already shown, Metro-North has not fairly presented to this Court either the facts or the law upon which it relies. A final example seems worth noting, even here. It claims (Pet'n, p. 10) that it knows of "no case interpreting" the statute upon which we here rely "to require a non-federal employer to 'accommodate' a rehabilitating alcoholic . . . ." Such cases do exist[5] and, although we understand why Metro-North may not

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4. For example: *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), *aff'd without opinion*, 790 F.2d 964 (D.C. Cir. 1986) (cited at Pet'n, p. 7) specifically stated that the employee's termination took place while "he was unrehabilitated;" the quotation from the case (Pet'n, p. 8) to the effect that he "was in need of rehabilitation at the time of the incidents giving rise to this suit" and was therefore "not protected" by the statute is misleading — those "incidents" involved his *firing*, not his misconduct; *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir.), *cert. denied*, 111 S. Ct. 555 (1990) — allegedly "identical" to this case (Pet'n, p. 8) — is cited for the proposition that the fired plaintiff had been rehabilitated by the time of his firing; the Fifth Circuit held, however (Pet'n, p. 9), that he was a "*current dysfunctional alcoholic at the time of his firing;*" *Railway Labor Executives' Ass'n v. Burley*, 839 F.2d 575, 591 (9th Cir. 1988), *rev'd on other grounds sub nom., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (Pet'n, p. 9) specifically stated that the statute protects substance abusers "whose problems are under control . . . .;" *Burka v. New York City Transit Authority*, 680 F. Supp. 590, 600-01 (S.D.N.Y. 1988) (Pet'n, p. 9) actually holds (at 597) that the statute "protects . . . otherwise qalified drug abusers who have been or are being rehabilitated;" *Matzo v. Postmaster General*, 685 F. Supp. 260, 263 (D.D.C. 1987), *aff'd without opinion*, 861 F.2d 1290 (D.C. Cir. 1988) is cited for the proposition that the court "found" plaintiff's termination proper "notwithstanding the remission of her illness;" even a cursory reading of the opinion will show that the "so-called remission" was merely argued by plaintiff but *never* "found" as a fact by the court.

5. *See Alexander v. Choate*, 469 U.S. 287, 300-01 (1985), in which this

(Cont'd)

agree with them, we fail to understand its statement that it does nct "know" about them, especially since we cited them for that very proposition in our brief in both the District Court and in the Second Circuit.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 11, 1992

(Cont'd)
Court squarely held that Section 504 requires a federal aid grantee to grant a "reasonable accommodation" to an "otherwise qualified handicapped person;" *Wallace v. Veteran's Administration*, 683 F. Supp. 758, 763 (D. Kan. 1988) ("[B]oth §§ 501 and 504 impose a duty of reasonable accommodation upon the employer . . . .").